Kejuruteraan Bintai Kindenko Sdn Bhd v Serdang Baru Properties Sdn Bhd & Ors

HIGH COURT (SHAH ALAM) — SUIT NO 22–1685 OF 2008
GUNALAN MUNIANDY JC
30 SEPTEMBER 2015

Evidence — Burden of proof — Allegations of fraud — Whether plaintiff discharged its burden of proof in regard to its claim — Fraud in civil action — Beyond reasonable standard of proof — Whether general accusation of fraud would suffice — Whether plaintiff satisfied beyond reasonable standard to prove fraud — Submission of no case to answer by second and third defendants — Whether submission could be upheld — Adverse inference — Failure to call material witness — Whether adverse inference under s 114(g) of the Evidence Act 1950 should be invoked against plaintiff for its failure to call architect as witness — Whether plaintiff adduced sufficient evidence to establish its case against fourth defendant — Whether plaintiff adduced any evidence to prove existence of agreement between defendants to injure plaintiff or cause loss to plaintiff

The first defendant had appointed the plaintiff as its turnkey contractor to design, construct and complete a Retail Commercial Complex with Residential Apartments ('the development project') on a property situated in Selangor. The terms and conditions of the development project were as per the building contract executed between the plaintiff and the first defendant. The first defendant had engaged its own consultants to carry out and manage the development project. When disputes arose between the plaintiff and the first defendant, the plaintiff filed an action against the first and second defendants and then later amended its writ to include the third and fourth defendants. The second and third defendants were the directors of the first defendant, while the fourth defendant was the quantity surveyor engaged as a consultant to manage the development project. The dispute between the first defendant and the plaintiff was referred to arbitration for settlement. The plaintiff's claim against the second and third defendants was for the tort of procuring breach of contract, tort of unlawful interference with contract, conspiracy, fraud and improper and undervaluation of the plaintiff's work under the turnkey contract between the plaintiff and the first defendant. The plaintiff's claim against the fourth defendant was founded on the contention that the latter had, on the instructions of the second and third defendants, undervalued the works carried out by the plaintiff thereby breaching its duty of care to the plaintiff. It was the plaintiff's case that the second, third and fourth defendants had allegedly acted together in conspiracy and fraudulently to cause loss to the plaintiff. At the close of the plaintiff's case, the second and third defendants

submitted that no case to answer had been made out against them on the pleaded claim. In regard to the tort of conspiracy the defendants submitted that the plaintiff had not adduced any evidence to prove the existence of an agreement between the defendants to injure the plaintiff.

Held, dismissing the claim with costs:

(1) After having carefully considered the evidence adduced by the plaintiff to prove its claim in its totality it was clear that the plaintiff had failed to establish on a prima facie basis the essential allegations against the second and third defendants, which were the foundation of its claim, namely, conspiracy, fraud and/or the tort of interference with contract and inducing a breach of contract by the first defendant. These were serious allegations and the plaintiff had to bear a heavy burden to prove the vital elements of fraud, conspiracy, interference, etc. by the second and third defendants. With regard to fraud it is well settled that even in a civil action the burden of proof of fraud was on the beyond reasonable doubt standard. However, the evidence led by the plaintiff certainly did not satisfy the beyond reasonable standard to prove fraud as alleged against the defendants (see paras 16–18).

(2) It was also noted that the plaintiff's contract was with the first defendant only and that in substance, the plaintiff's grievances were against the first defendant company. In the circumstances, the first defendant company's action or omission could not be equated to those of the second and third defendants to render them liable. In principle and on the facts, the allegation of unlawful interference against the second and third defendants was baseless and unsustainable. It was further never shown that the second and third defendants had acted beyond their duties as directors and in their personal capacity. Hence, at the close of its case, the plaintiff had totally failed to discharge its burden of proof in regard to its claim and therefore, the submission of the second and third defendants that they had no case to answer should be upheld (see paras 17 & 19–20).

(3) The plaintiff's allegations against the fourth defendant were for fraud, negligence and breach of its obligations which were serious in nature, with the standard of proof of fraud being beyond reasonable doubt. A general accusation of fraud would not suffice, as was the plaintiff's case here, without particulars being pleaded which was mandatory for a claim based on fraud to be sustainable. However, the evidence led by the plaintiff certainly did not satisfy the beyond reasonable standard to prove fraud as alleged against the fourth defendant (see paras 15 & 23).

(4) It was beyond dispute that under the explicit terms of the construction contract the responsibility and authority for valuation of the works executed by the plaintiff and issuance of interim certificate of payment were wholly vested in the employer's representative ('ER'), who was

empowered to delegate his authority to other professionals of the proposed development. Nowhere was there authority and power for valuation of works vested in the fourth defendant. From the overall evidence, it could only be concluded that the fourth defendant had executed his function and duties as the consulting quantity surveyor strictly in accordance with his terms of appointment by the first defendant and standard practice of the profession. No evidence at all was forthcoming from the plaintiff to the contrary. As such, the plaintiff had failed to satisfy the onus of proof that it bore. In fact, not even an iota of evidence was raised in these proceedings, which could show that the fourth defendant had acted on the instructions of the second and third defendants in matters relating to the valuation of work done by the plaintiff or had valued the works completed by the plaintiff. Thus, based on the undisputed facts and uncontradicted evidence, the central allegation against the fourth defendant that it had deliberately undervalued the works executed by the plaintiff, in collusion with second and third defendants and in doing so had acted fraudulently and negligently in breach of its obligation was wholly misconceived and devoid of any evidential basis (see paras 25–27 & 29).

(5) In the present case, the architect, who certified the plaintiff's work, was a crucial witness who ought to have been called to support the plaintiff's pleaded claim, particularly as regards the serious allegation made against the fourth defendant of undervaluing the plaintiff's work. However, the plaintiff had not given any plausible or reasonable explanation as to why the architect was not named a defendant in this suit or called as a witness to testify in these proceedings. Thus, the plaintiff's failure to call the architect, who was a material witness in this matter, would result in an adverse inference under s 114(g) of the Evidence Act 1950 being invoked against the plaintiff. Based on the evidence it was crystal clear that the plaintiff had failed to discharge the burden of proof of the allegation of fraud on the above standard of proof and the other allegations on a balance of probabilities based on the pleaded particulars of the said torts (see paras 31–32 & 34).

[Bahasa Malaysia summary

Defendan pertama telah melantik plaintif sebagai kontraktor *turnkey* untuk mereka, membina dan menyempurnakan satu 'Retail Commercial Complex with Residential Apartments' ('projek pembangunan') di atas satu hartanah yang terletak di Selangor. Terma dan syarat projek pembangunan adalah seperti kontrak bangunan yang dimasuki antara plaintif dan defendan pertama. Defendan pertama teah melantik perundingnya sendiri untuk menjalankan dan menguruskan projek pembangunan tersebut. Apabila timbul pertikaian antara plaintif dan defendan pertama, plaintif memfailkan tindakan terhadap defendan pertama dan kedua dan kemudian meminda writnya untuk

memasukkan defendan ketiga dan keempat. Defendan kedua dan ketiga merupakan pengarah defendan pertama manakala defendan keempat adalah juruukur binaan yang dilantik sebagai perunding untuk menguruskan projek pembangunan. Pertikaian antara defendan pertama dan plaintif dirujuk kepada timbang tara untuk penyelesaian. Tuntutan plaintif terhadap defendan kedua dan ketiga adalah bagi tort pelanggaran kontrak, tort campur tangan kontrak secara salah, konspirasi, penipuan dan penilaian rendah dan tidak teratur terhadap kerja-kerja plaintif di bawah kontrak *turnkey* antara plaintif dengan defendan pertama. Tuntutan plaintif terhadap defendan keempat berasaskan hujahan bahawa defendan keempat, atas arahan defendan kedua dan ketiga, membuat penilaian rendah atas kerja-kerja yang dijalankan oleh plaintif lantas melanggar kewajipan berhatinya-hatinya terhadap plaintif. Kes plaintif adalah bahawa defendan kedua, ketiga dan keempat dikatakan bertindak bersama-sama secara konspirasi dan menipu untuk menyebabkan kerugian kepada plaintif. Di penghujung kes plaintif, defendan kedua dan ketiga menghujahkan bahawa mereka tiada kes untuk dijawab berdasarkan tuntutan pliding. Berkenaan tort konspirasi, defendan menghujahkan bahawa plaintif tidak mengemukakan apa-apa keterangan untuk membuktikan kewujudan perjanjian antara defendan-defendan untuk menjejaskan plaintif.

Diputuskan, menolak tuntutan dengan kos:

(1) Selepas meneliti keterangan yang dikemukakan oleh plaintif untuk membuktikan tuntutannya secara menyeluruh, jelas bahawa plaintif gagal membuktikan, secara prima facie, dakwaan asas terhadap defendan kedua dan ketiga, yang membentuk asas tuntutannya, khususnya konspirasi, penipuan dan/atau tort campur tangan kontrak dan menyebabkan pelanggaran kontrak oleh defendan pertama. Terdapat dakwaan-dakwaan serius dan plaintif memikul beban yang berat untuk membuktikan elemen-elemen penting penipuan, konspirasi, campur tangan dan sebagainya oleh defendan kedua dan ketiga. Berkenaan penipuan, adalah undang-undang matan bahawa dalam tindakan sivil sekali pun, beban membuktikan penipuan adalah berdasarkan standard melampaui keraguan munasabah. Walau bagaimanapun, keterangan yang dikemukakan oleh plaintif sememangnya tidak memenuhi standard melampaui keraguan munasabah untuk membuktikan penipuan seperti yang didakwa terhadap defendan-defendan. (lihat perenggan 16–18).

(2) Kontrak plaintif dengan defendan pertama sahaja dan kilanan plaintif adalah terhadap syarikat defendan pertama. Dalam hal keadaan ini, tindakan atau ketinggalan defendan syarikat tidak boleh disamakan dengan tindakan defendan kedua dan ketiga untuk menjadikan mereka bertanggungan. Berdasarkan prinsip dan fakta, dakwaan campur tangan salah terhadap defendan kedua dan ketiga adalah tidak berasas dan tidak boleh dikekalkan. Seterusnya, tidak dibuktikan bahawa defendan kedua dan ketiga telah bertindak melampaui tanggungjawab mereka sebagai

pengarah dan dalam kapasiti peribadi mereka. Oleh itu, di penghujung kes, plaintif langsung gagal melepaskan beban pembuktian bagi tuntutannya dan dengan itu, hujahan defendan kedua dan ketiga bahawa mereka tiada kes untuk dijawab patut dikekalkan (lihat perenggan 17 & 19–20).

(3) Dakwaan-dakwaan plaintif terhadap defendan keempat adalah bagi penipuan, kecuaian dan pelanggaran kewajipannya yang mana bersifat serius, dengan standard pembuktian penipuan melampaui keraguan munasabah. Tuduhan am penipuan tidak cukup kerana kes plaintif ini, tanpa butiran yang diplidkan, yang mana mandatori, untuk mengekalkan tuntutan berasaskan penipuan. Walau bagaimanapun, keterangan yang dikemukakan oleh plaintif sememangnya tidak memenuhi standard melampaui keraguan munasabah untuk membuktikan penipuan seperti yang didakwa terhadap defendan keempat (lihat perenggan 15 & 23).

(4) Sememangnya tidak boleh disangkal lagi bahawa di bawah terma nyata kontrak pembangunan, tanggungjawab dan kuasa penilaian kerja-kerja yang dijalankan oleh plaintif dan pengeluaran sijil interim bayaran terletak sepenuhnya pada wakil majikan ('ER'), yang mempunyai kuasa untuk memberi kuasanya kepada profesional lain bagi pembangunan yang dicadangkan. Tidak ada dalam mana-mana bahawa kuasa bagi penilaian kerja-kerja terletak pada defendan keempat. Berdasarkan keterangan keseluruhan, apa yang boleh disimpulkan adalah bahawa defendan keempat telah melaksanakan fungsi dan tanggungjawabnya sebagai perunding jurrukur binaan khusus selaras dengan terma pelantikannya oleh defendan pertama dan praktis standard profesyen tersebut. Tiada keterangan yang dikemukakan oleh plaintif yang menunjukkan sebaliknya. Dengan itu, plaintif gagal memenuhi beban bukti yang dipikulnya. Malahan, tidak secebis keterangan pun dibangkitkan dalam prosiding ini yang menunjukkan bahawa defendan keempat telah bertindak atas arahan defendan kedua dan ketiga bagi penilaian kerja-kerja yang dilakukan oleh plaintif atau sama ada penilaian kerja-kerja telah disempurnakan oleh plaintif. Oleh itu, berdasarkan fakta yang tidak dipertikaikan dan keterangan yang tidak boleh disangkal, dakwaan utama terhadap defendan keempat bahawa ia dengan sengaja menilai kerja-kerja yang plaintif laksanakan dengan rendah, berpakat dengan defendan kedua dan ketiga dan dalam melakukan sedemikian telah bertindak menipu dan dengan cuai melanggar kewajipannya adalah satu salah tanggapan dan tidak mempunyai apa-apa bukti asas (lihat perenggan 25–27 & 29).

(5) Dalam kes ini, arkitek yang mengesahkan kerja plaintif adalah saksi penting yang sepatutnya dipanggil untuk menyokong tuntutan plaintif yang diplidkan, khususnya berkenaan dakwaan serius yang dilemparkan

terhadap defendan keempat iaitu menilai kerja-kerja plaintif dengan rendah. Walau bagaimanapun, plaintif tidak memberikan penjelasan munasabah dan yang boleh diterima tentang mengapa arkitek tidak dinamakan sebagai defendan dalam guaman ini atau dipanggil sebagai saksi untuk memberi keterangan dalam prosiding. Oleh itu, kegagalan plaintif untuk memanggil arkitek, yang merupakan saksi material dalam hal perkara ini, akan membangkitkan anggapan bertentangan di bawah s 114(g) Akta Keterangan 1950 terhadap plaintif. Berdasarkan keterangan, jelas bahawa plaintif gagal melepaskan beban bukti terhadap dakwaan penipuan atas standard pembuktian dan dakwaan-dakwaan lain atas imbangan kebarangkalian berdasarkan butir-butir yang diplidkan mengenai kesemua tort tersebut (lihat perenggan 31–32 & 34).]

Notes

For cases on allegations of fraud , see 7(1) *Mallal's Digest* (5th Ed, 2015) paras 708–710.

Cases referred to

CGU Insurance Bhd v Asean Security Paper Mills Sdn Bhd [2006] 3 MLJ 1, CA (folld)

Hock Hua Bank (Sabah) Bhd v Lam Tat Ming & Ors [1995] 4 MLJ 328, HC (refd)

Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals [2010] 5 MLJ 394; [2008] 3 MLRA 504, CA (refd)

Ting Ling Kiew & Anor v Tang Eng Iron Works Co Ltd [1992] 2 MLJ 217; [1992] 1 MLRA 336, SC (refd)

UN Pandey v Marco Polo Pte Ltd [1980] 1 MLJ 4 (refd)

Legislation referred to

Evidence Act 1950 ss 101, 102, 103, 114(g)

Jasvinjit Singh (Jasvinjit Singh & Co) for the plaintiff.

SK Lam (Haryaty Hashim with him) (Chang Haryaty) for the second and third defendants.

WA Lau (WA Lau & Partners) for the fourth defendant.

Gunalan Muniandy JC:

[1] This is an action by the plaintiff against the defendants for various declarations, damages, injunction, etc based on breach of contract, fraud, conspiracy, interference with contract to induce breach, negligence and related reliefs. The chronology of events in this proceeding leading to the trial as enumerated in the submission of the second and third defendant is reproduced below for convenience:

(a) that the plaintiff commenced its action against the first and second defendants on 10 October 2008;

(b) that the plaintiff on/about 4 November 2008 amended its writ of summons to add the second and third defendants;

(c) that on/about 14 April 2009, all disputes between the first defendant and the plaintiff was referred to arbitration proceeding; and

(d) that the plaintiff appealed against the said order where the Court of Appeal affirmed said order and dismissed the plaintiff's appeal.

AGREED FACTS

[2] A brief summary of agreed facts is set out in the fourth defendant's submission is as follows:

> The Plaintiff had been appointed by the 1st Defendant as its Turnkey Contractor to design, construct and complete a Retail Commercial Complex with Residential Apartments on Lot 42095 (P.T. 3114), Mukim Petaling, Daerah Petaling, Selangor Darul Ehsan upon the terms and conditions contained in the contract documents in Exhibit 'P6'.
>
> The 1st Defendant had engaged its own consultants to carry out and manage the said Development Project, the consultants are:-
>
> (a) Project Manager – For the Future Project Management Sdn. Bhd.;
>
> (b) M & E Checker – JuruteraPerundingUrus Jaya Sdn. Bhd.;
>
> (c) Architect – AEON Architect;
>
> (d) Civil & Structural Engineer – SingmaJuruteraPerunding;
>
> (e) Quantity Surveyor – JuruteraKosrancang Sdn Bhd.; and
>
> (f) Employer's Representative (E.R.) – Lee Beng Cheong
>
> Disputes and differences arose between the Plaintiff and 1st Defendant in connection with works and/or the building contract and the said disputes and differences have been referred to Arbitration for settlement.

THE PLAINTIFF'S CASE AGAINST THE SECOND, THIRD AND FOURTH DEFENDANTS ('D2, D3 AND D4')

[3] The plaintiff's claim against D2 and D3 comprised the following causes of action:

(a) tort of procuring breach of contract;

(b) tort of unlawful interference with contract;

(c) conspiracy;

(d) fraud; and

(e) improper and undervaluation of plaintiff's work under the turnkey contract between the plaintiff and the first defendant ('D1').

[4] At the close of the plaintiff's case, D2 and D3 submitted that no case to answer had been made out against them on the pleaded claim.

[5] In respect of the fourth defendant ('D4') the plaintiff's summary of case states that its cause of action against D4 is founded on the contention that D4, on instructions of D2 and D3, valued the works carried out by the plaintiff in a sum way below the value of the works completed by the plaintiff thereby breaching its duty of care to the plaintiff. D2, D3 and D4 are alleged to have acted together in conspiracy and fraudulently as particularised in its statement of claim ('SOC').

[6] In the SOC, the plaintiff prayed for the following reliefs against D4:

(a) the value of the works carried out by the plaintiff which as of 29 May 2007 amounts to RM30,427,302.21 together with a turnkey factor of 15% on the said sum and interest at the rate of 6%pa on the sum of RM427,302.21 and all sum above RM30m;

(b) damages for conspiracy, fraud, negligence and causing plaintiff's economic loss;

(c) general and aggravated damages be assessed;

(d) interest on all such damages as may be awarded to plaintiff; and

(e) costs.

[7] Out of the voluminous SOC consisting of 93 paragraphs, only four paragraphs contain averments directed at D4, ie, paras 43, 87, 88 and 89.

FINDING

[8] The legal burden of proving the case based on the pleaded claim lies throughout on the plaintiff. Apart from that, the plaintiff ('P') bears the evidential burden of introducing sufficient evidence to prove all the material and essential particulars of its claim as per the statement of claim. The plaintiff ('P') has to make out a prima facie case on its pleadings before the onus shifts to the defendants to establish their defence. In this context, the duty of the plaintiff is to adduce all necessary and material evidence to prove the primary allegations of fact on which its cause of action is founded. The plaintiff cannot

just rely on factual assertions in its pleadings, which do not constitute proof of the facts in issue, notwithstanding the absence of rebuttal evidence on these unproven facts.

[9] Sections 101–103 of the Evidence Act 1950 govern the law on burden of proof:

Section 101 of the Evidence Act 1950 in relation to on burden of proof provides that:

> (1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Section 102 of the Evidence Act 1950 on whom burden of proof lies provides that:

> The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Section 103 of Evidence Act 1950 on burden of proof as to particular fact provides that:

> The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

CLAIM AGAINST THE SECOND AND THIRD DEFENDANT

[10] First and foremost, D2 and D3 contended that the plaintiff's claim should be dismissed outright *in limine* on the ground that throughout the trial till close of its case none of its witnesses adduced any evidence to prove damages suffered by the plaintiff as a result of the acts, omissions or conduct of D2 and/or D3. It was contended that on this ground alone the claim was unsustainable and should be dismissed as the pleaded cause of action was not in law actionable per se without proof of damages suffered.

[11] Secondly, there was not even a shred of evidence from any of the plaintiff's four witnesses to prove the existence of a conspiracy between D1 to D3 and D4 to fraudulently and negligently cause loss and damage to the plaintiff by means of an agreement among them to injure the plaintiff. The defendants made reference to the Court of Appeal case of *Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals* [2010] 5 MLJ 394; [2008] 3 MLRA 504 where it was held that in regard to the tort of conspiracy the following elements need to be satisfied:

A

(a) an agreement between two or more persons;

(b) an agreement for the purpose of injuring the complaint;

(c) the act done in execution of that agreement resulted in damage to the complainant; and

B

(d) damage is an essential element and where damage is not pleaded the Statement of Claim may be struck out.

[12] The Court of Appeal further remarked that:

C

It is clear that the very first element to be shown must be an agreement between two or more persons for the purpose of injuring ...

It is trite law that the agreement to injure must come first (in other words the agreement should have crystallised) before the alleged unlawful acts are done in execution of or pursuant to the agreement.

D

[13] The plaintiff's allegation of misconduct against D4 by deliberate undervaluation of its progress claims pursuant to a conspiracy with D1 to D3 was wholly unsubstantiated on the facts as the plaintiff did not even call a single quantity surveyor to challenge or contradict D4's valuation which was subsequently endorsed by the architect.

E

[14] As correctly submitted by D4, even assuming the evidence of conspiracy can be considered it was far from prima facie proof of conspiracy against the defendants.

F

[15] Next issue for consideration is the allegation of fraud against D2 and D3 acting in concert with D4. It is well settled that even in a civil action the burden of proof of fraud is on the beyond reasonable doubt standard. Equally important is the principle that the plaintiff is required to prove actual fraud. a general accusation of fraud would not suffice, as in the plaintiff's case here, without particulars being pleaded which is mandatory for a claim based on fraud to be sustainable. In *Ting Ling Kiew & Anor v Tang Eng Iron Works Co Ltd* [1992] 2 MLJ 217; [1992] 1 MLRA 336, the Federal Court dealt, inter alia, with the issue of fraud. Mohd Jemuri Serjan CJ (Borneo) pronounced as follows on this point:

G

H

.... In such a case as the present where fraud or intention to defraud is the central issue we agree that the particulars of fraud must be specifically pleaded and it is obvious that the particulars of the fraud are absent in the affidavit of the manager of the respondent company. On this point we find strong support in the case of *Wallingford v Mutual Society* [1879-1880] 5 AC 685, particularly in the speeches of Lord Selborne (Lord Chancellor), Lord Hatherley and Lord Watson at p 697, Lord Selborne said:

I

With regard to fraud, if there be any principle which is perfectly well settled, it is

> that general allegations, however strong may be the word in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice. And here I find nothing but perfectly general and vague allegations of fraud. No single material fact is condescended upon, in a manner which would enable any Court to understand what it was that was alleged to be fraudulent ...

[16] It is pertinent to note that no police report whatsoever was made against D2 and D3 despite the grave allegation of fraud in this suit. Prior to this proceedings, there is no record of even a single complaint or allegation of fraud having been made against D2 and D3. The evidence led by P certainly did not satisfy the beyond reasonable standard to prove fraud as alleged against the defendants.

[17] On the allegation of unlawful interference, P led evidence against D1, accusing the company for such an act. However, D1 was not a party at the trial as all issues between D1 and P arising from the claimwere ordered to be referred to arbitration and heard at the arbitration proceedings. P's stand that whatever actions by D1 as a company limited by shares against P, rightfully or wrongfully, would be considered as an action of D2 and D3 is clearly unsustainable erroneous as rightly contended by D2 and D3. Instead, it contravenes basic principles of company law. The company's action or omission cannot be equated to those of D2 and D3 to render them liable. In principle and on the facts, the allegation of unlawful interference against D2 and D3 was baseless and unsustainable. It was further never shown that D2 and D3 acted beyond their duties as directors and in their personal capacity.

[18] The law pertaining to a submission of no case to answer was expounded by TS Sinnanthuray J in case of *UN Pandey v Marco Polo Pte Ltd* [1980] 1 MLJ 4 as follows:

> There are, however, two sets of circumstances under which a defendant may submit that he has no case to answer. In the one case, there may be a submission that, accepting the plaintiff's evidence at its face value, no case has been established in law, and in the other that the evidence led for the plaintiff is so unsatisfactory or unreliable that the court should find that the burden of proof has not been discharged.
>
> In my judgment, it would be a desirable practice in our courts to allow a submission of no case to answer at the end of the plaintiffs case, without putting the defendant to his election, whether to call evidence or not, if his submission fails. It is trite to say that we have a young legal profession and a fused one. Most are small practitioners and engage in many fields of law. The time and effort put in litigation matters are diffused. Such a practice therefore will ensure not only that there is a thorough preparation of the case before trial, but also a careful presentation of it at the hearing. Altogether, the practice will bring about a saving of costs for the parties.

[19] In conclusion, D2 and D3 have submittedno case to answer principally on the ground of total failure by P to discharge its legal and evidential burdens of proof. I have considered carefully the evidence that P has adduced to prove its claim in its totality. It is important to note the P's contract is with the first defendant ('D1') only and in substance, P's grievances are against D1. As for D2 and D3, it is this court's finding that P has clearly failed to adduce credible evidence that is sufficient to establish on a prima facie basis the essential allegations against D2 and D3 which are the foundation of its claim, namely, conspiracy, fraud and/or the tort of interference with contract and inducing a breach of contract by D1. These are serious allegations in respect of which P bears a heavy burden to prove the vital elements of fraud, conspiracy, interference, etc by D2 and D3. Hence, at the close of its case, P has totally failed to discharge its burden of proof in regard to its claim and therefore, the submission of D2 and D3 that they have no case to answer is upheld.

CLAIM AGAINST D4

[20] P's claim against D4 for damages and losses as pleaded above are also based on the torts of conspiracy and fraud together with D2 and D3. Apart from that, also on negligence for causing economic loss to P. The allegations pleaded against D4 material to the claim are contained only in four paragraphs of the statement of claim consisting of 93 paragraphs. Basically, the essential allegations contained therein are fraud, negligence and breach of its obligations which are serious in nature. It is to be noted that the standard of proof of fraud is beyond reasonable doubt as adverted to above.

[21] For convenience, the relevant parts of the SOC pertaining specifically to D4 are reproduced as follows:

> 43. The 4th Defendant also, on the instructions of the 2nd and 3rd Defendants, valued the works carried out by the Plaintiff in a sum way below the value of the works completed by the Plaintiff and certified by the Architect of the said Development.
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> 87. The 4th Defendant as a party responsible for certifying the Plaintiff's progressive claims owed the Plaintiff a duty of care to:
>
> (a) Value the Plaintiff's work and certify the Plaintiff's claims thereon;
>
> (b) Make a fair and honest assessment of the Plaintiff's claim in accordance with the terms agreed between the Plaintiff and the 1st Defendant;
>
> (c) Not to delay the valuation and certification.
>
> 88. The 4th Defendant would rather be liable to the Plaintiff for any economic losses the Plaintiff may incur by reason of any breach of its obligations stated above.
>
> 89. Fraudulently and negligently and I breach of its obligations stated in Paragraph 88 and 89 above, the 4th Defendant: ...

[22] Firstly, as regards the allegation of fraud, this has been dealt with under the claim against D2 and D3. Similarly, material particulars of fraud have not been pleaded contrary to established principles. Hence, the claim based on fraud is misconceived and wholly unsustainable. Suffice to stay that, from the evidence adduced, the facts and circumstances alluded to by P also do not constitute any actual fraud in any recognised form by D4 in the sense of dishonestly of some sort or a wilful dishonest act. Whether fraud exists is a question of fact dependent upon the circumstances of each particular case (see *Hock Hua Bank (Sabah) Bhd v Lam Tat Ming &Ors* [1995] 4 MLJ 328). The relevant evidence fell far short of proving fraud against D4 beyond reasonable doubt.

[23] The entire basis of P's claim against D4 was that he was responsible for certifying P's progressive claim and therefore, owed a duty of care to P as particularised in para 87 of the SOC. It was further alleged that the losses suffered by P were the result of breach of duty of care by D4 as well as his obligation under the contract between P and D1.

[24] A paramount factor in relation to the principal allegation that D4, on the instruction of D2 and D3, had undervalued the works carried out by the plaintiff and certified by the architect of the project is that the construction contract which is the subject of this suit is between the plaintiff and D1 only. D4 was engaged by D1 as a consulting quantity surveyor ('QS') for the project whose scope of works are set out in Annexure A an agreement dated 15 December 2001. It is beyond dispute that under the explicit terms of the construction contract the responsibility and authority for valuation of the works executed by the plaintiff and issuance of interim certificate of payment are wholly vested in the employer's representative ('ER') who is empowered to delegate his authority to other professionals of the proposed development. Nowhere is there authority and power for valuation of works vested in D4.

[25] The evidence of DW1 given on behalf of D4 disclosed that all valuation of works executed by the plaintiff was done in accordance with the terms and conditions of the building contract agreed upon between the employer and the contractor. Each and every endorsement by DW1 in the valuation for interim certificate was signed and endorsed by the architect, who is neither a party to this suit nor produced as a witness by the plaintiff. Thereafter, the architect recommended payments in the sums stated. Neither the plaintiff nor D1 disputed or objected to any of the architect's interim certificates for payment before this action was commenced. From the overall evidence, it can only be concluded that D4 had executed his function and duties as the consulting QS strictly in accordance with his terms of appointment by D1 and standard practice of the profession. No evidence at all was forthcoming from the

plaintiff to the contrary that could rebut DW1's evidence. The plaintiff, thus, failed to satisfy the onus of proof that it bore.

[26] It is crucial to note that there is not even an iota of evidence in this proceedings which could show that the fourth defendant has acted on instructions of second and third defendants in matter relating to valuation of work done by the plaintiff and/or has valued the works completed by the plaintiff.

[27] As highlighted by D4, at all material times prior to commencement of this action, the plaintiff has not disputed or challenged the valuation for interim certificates Nos 1–3 prepared by the fourth defendant. The plaintiff's witness ('PW1') failed to substantiate his assertion that the plaintiff had disputed or challenged the valuation for interim certificates Nos 1–3.

[28] Based on the undisputed facts and uncontradicted evidence, the central allegation against D4 that it had deliberately undervalued the works executed by the plaintiff, in collusion with D2 and D3, way below their actual value and in doing so had acted fraudulently and negligently in breach of its obligation was wholly misconceived and devoid of any evidential basis.

[29] It was also correctly submitted by D4 that the plaintiff's case against D4 is centeredaround the allegation of conspiracy to under-valued work done and wrongful deduction of liquidated damages. In this context it is important to note that valuation of work done was approved and endorsed by the architect and imposition of liquidated damages was based on non-completion certificate and advice issued by the architect.

[30] In the circumstances, the said architect is a crucial witness who ought to have been called to support the plaintiff's pleaded claim, particularly as regards the serious allegation made against D4. However, the plaintiff did not give any plausible or reasonable explanation as to why the architect is not named a defendant in this suit nor the architect is called as a witness to testify in this proceedings.

[31] I, therefore, upheld the contention that for plaintiff's failure to call the architect who is a material witness in this matter an adverse inference under s 114(g) of the Evidence Act 1950 should be invoked against the plaintiff.

[32] This contention finds support in *CGU Insurance Bhd v Asean Security Paper Mills Sdn Bhd* [2006] 3 MLJ 1 Gopal Sri Ram JCA (later FCJ) held:

> Here is a man who is repeatedly mentioned by more than one witness relating the part he played. The respondent's failure to call him although he was present in court (as may be seen from the notes of evidence) in the circumstances of this case warrants the drawing of an adverse inference under s 114(g) of the Evidence Act 1950. It has been held by the Judicial Committee of the Privy Council in *Seth Maganmal v Darbarilal* AIR 1928 PC 39 that an adverse inference may be legitimately drawn against a party who fails –
>
> To call as his witness the principal person involved in the transaction, who was in a position to give a firsthand account of the matters in controversy and throw light on them, and who could have refuted on oath the allegations of the other side ...

[33] To conclude on the case against D4, upon considering the evidence of both parties, including the failure of P to call a crucial witness, ie, the architect who certified the work, it is crystal clear that P had failed to discharge the burden of proof of the allegation of fraudon the above standard of proof and the other allegations on a balance of probabilities based on the pleaded particulars of the said torts.

[34] On the above grounds, P's claim against D2, D3 and D4 is dismissed with costs.

Claim dismissed with costs.

Reported by Kohila Nesan